

**STATE OF NORTH DAKOTA**  
**GAME AND FISH DEPARTMENT**

IN THE MATTER OF:

Randy Brian Higgins

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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND DECISION**

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**STATEMENT OF THE CASE AND PROCEEDINGS**

These proceedings arise upon the request of Randy Brian Higgins for a hearing pursuant to N.D.C.C. § 20.1-13.1-08 to review the intention of the director of the North Dakota Game and Fish Department to prohibit him from operating a motorboat or vessel pursuant to N.D.C.C. § 20.1-13.1-06 for refusing to submit to testing under N.D.C.C. § 20.1-13.1-01. (For convenience, the North Dakota Game and Fish Department is sometimes referred to as the Department, and Randy Brian Higgins is sometimes referred to as Higgins.)

Higgins was arrested on July 12, 2003, for operating a motorboat in violation of N.D.C.C. § 20.1-13-07, and in accordance with the provisions of N.D.C.C. § 20.1-13.1-06 was that day given a written notice of intent to prohibit him from operating a motorboat or vessel upon his refusal to submit to testing under N.D.C.C. § 20.1-13.1-01. On July 15, 2003, Higgins, by his counsel, requested a hearing to review the facts and law constituting cause for prohibiting him from operating a motorboat or vessel under N.D.C.C. § 20.1-13.1-06.

Pursuant to the request of the Department, I was designated by the Office of Administrative Hearings the administrative law judge to schedule and conduct the hearing and render the decision. The hearing was scheduled pursuant to the agreement of the parties to be

held August 6, 2003, and notice of hearing and specification of issue was duly served. The hearing was held as agreed and noticed and completed that day.

In accordance with the provisions of N.D.C.C. § 20.1-13.1-08(3), the issues specified for consideration and determination upon the hearing were (1) whether a game warden or law enforcement officer had probable cause to believe Higgins had been operating a boat in violation of section 20.1-13-07; (2) whether Higgins was placed under arrest; and (3) whether Higgins refused to submit to the chemical test.

Having considered the evidence of the testimony of the witness, Warden Jackie Lundstrom, and the exhibits offered on behalf of the parties and received, together with the arguments of counsel, I conclude that the greater weight of the evidence shows that a game warden had probable cause to believe that Higgins had been operating a pontoon in violation of N.D.C.C. § 20.1-13-07, that he was placed under arrest, and that he refused to submit to a chemical test under N.D.C.C. § 20.1-13.1-01, and accordingly make the following findings of fact, conclusions of law, and decision.

### **FINDINGS OF FACT**

1. Sometime about ten o'clock p.m. on July 12, 2003, Warden Jackie Lundstrom was informed by a radio call from her supervisor that there was a boat operating on the Missouri River near the Expressway Bridge with its docking lights on. (For convenience, Warden Lundstrom is referred to as Lundstrom.) She and another warden found the boat, a pontoon. Approaching the pontoon. Lundstrom was unable to see the pontoon's navigation lights until she was sufficiently close to the boat that the light of the docking lights was closer to water level.

2. N.D. Admin. Code § 30-05-01-02 (6) requires, among other things, that when operating between sunset and sunrise a motorboat under 26 feet in length shall exhibit a

combination red and green bowlight visible for one mile a certain number of degrees to the left and right of the centerline of the boat, and that a motorboat 26 feet in length or over shall exhibit a white bowlight visible for two miles, and a green side light on the right side and a red side light on the left side, each visible for one mile a certain number of degrees to right and left, respectively. (These bowlights and the green and red side lights are also referred to as “navigation lights.”) The pontoon has a docking light in cowling at each side of the bow, just above the deck, and a navigation light in each cowling, adjacent to the side of each docking light, so that the navigation light is visible from the side and the front of the pontoon; a green light on the right and a red light on the left. There is no evidence showing the length of the pontoon. In any event, the Department considers and its wardens are informed that operating a boat with docking lights while traveling in the channel of the river is a violation of N.D. Admin. Code § 30-05-01(6) for the reason that the illuminated docking lights obscure the navigation lights so that they are not visible for one mile as required by the rule. (Higgins offered photographs showing that the navigation lights of the pontoon were visible with the docking lights illuminated. There is, however, insufficient evidence to establish that the photographs were made in circumstances sufficiently similar to the circumstances existing on July 12, 2003, at the time the pontoon was observed by Lundstrom, and therefore are not sufficient evidence to rebut Lundstrom’s testimony.)

3. Lundstrom stopped the pontoon, and found that a man who later identified himself as Higgins was operating the pontoon. Upon boarding the pontoon Lundstrom informed Higgins of the requirement that the docking lights be off when operating the pontoon in the channel, and inquired whether there were life jackets for each person on board. Noticing a number of containers of alcoholic beverages on a table on the pontoon and a can of beer convenient to Higgins, Lundstrom asked Higgins how much he’d had to drink. Higgins responded that he’d had two since about five o’clock. Lundstrom asked Higgins if he would do

some tests. Higgins agreed, and Lundstrom administered three field sobriety tests; reciting the alphabet, counting backwards, and touching thumb to fingers while counting. Higgins failed to perform all three tests as instructed. During the tests, Lundstrom noticed that Higgins' speech was occasionally slurred and that his breath had an odor of alcohol.

4. Upon his completion of the three field sobriety tests, Lundstrom asked Higgins to provide a sample of his breath for a portable testing device used determine blood alcohol level. Higgins refused.

5. Following Higgins' refusal to provide a sample of his breath for testing, Lundstrom took him into custody and took him to a location on shore where the Department had a vehicle for transportation. On shore, Lundstrom informed Higgins, among other things, that he was being transported to the Burleigh County Detention Center to be tested to determine his blood alcohol level, and read him the Miranda warning. He was handcuffed and placed in the vehicle. On the way to the Burleigh County Detention Center, Lundstrom was informed that there was no one there to administer the test to determine blood alcohol level, and that Higgins should be taken to St. Alexius Medical Center emergency room for a blood test to determine his blood alcohol level. Lundstrom proceeded to St. Alexius with Higgins.

6. Before arriving at St. Alexius, Higgins informed Lundstrom that he would not take any test until he spoke with a lawyer. Lundstrom advised Higgins that he would be allowed to telephone a lawyer, and upon arriving at St. Alexus he was allowed to telephone a lawyer, and he did so. After Higgins spoke with a lawyer, he informed Lundstrom that he would not take any test. Lundstrom confirmed his intention not to take any test for the determination of his blood alcohol level, and read him the implied consent advisory on the reverse of the form entitled "REPORT AND NOTICE—BOATING UNDER THE INFLUENCE." Higgins did not retract his refusal to have a sample of his blood taken to determine his blood alcohol level.

7. Lundstrom completed and gave to Higgins the form entitled “REPORT AND NOTICE—BOATING UNDER THE INFLUENCE.”

8. Higgins has not previously been prohibited from operating a motorboat or vessel for a violation of N.D.C.C. ch. 20.1-13.1 or for a violation of N.D.C.C. § 20.1-13-07.

9. Although Lundstrom typically stops any motorboat or vessel operating in the channel of the Missouri River with docking lights, she has never written citation for the offense.

### **CONCLUSIONS OF LAW**

1. Higgins contends and argues that N.D.C.C. § 20.1-13-07(2) does not include intoxication resulting from the consumption of alcoholic beverages, and therefore there was not probable cause for Lundstrom to believe that Higgins had been operating the pontoon in violation of section 20.1-13-07, and particularly subsection 2 of that section. The argument is not without bases (which the requirements of N.D.C.C. § 20.1-13.1-08 do not allow time to discuss), but it is not reasonable to conclude that in the context of the chapter and the section the legislature did not intend that the word “intoxication” implied intoxication resulting from the consumption of alcoholic beverages. The North Dakota Supreme Court has commented that when interpreting statutes it follows the “cardinal rule” of statutory construction that the “interpretation must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives of statutes. *O’Fallon v. Pollard*, 427 N.W.2d 809 (N.D. 1988); *see Trinity Medical Center, Inc. v. Holum*, 544 N.W.2d 148, 152–153 (N.D.1996) (quoting the “cardinal rule” and citing N.D.C.C. § 1-02-01 which directs that code provisions are to be “construed liberally, with a view to effecting its objects and to promoting justice”).

2. Higgins also contends and argues that N.D. Admin. Code § 30-05-01-02 does not prohibit the operation of a motorboat or vessel in the channel of the Missouri River with docking

lights illuminated. Again, the argument is not without bases. Without discussing the relative merits of the argument and the Department's application of the rule in order to comply with the requirements of N.D.C.C. § 20.1-13.1-08, I conclude that the Department's interpretation and application of the rule is a reasonable construction to effect the legislative intent of N.D.C.C. §§ 20.1-13-12 and 20.1-13-05. *See Heartview Foundation v. Glaser*, 362 N.W.2d 232, 235 (N.D. 1985) (explaining that interpretation of administrative regulations, in addition to the interpretation of statutes, must be consistent with legislative intent and in furtherance of the policy goals and objectives). There is insufficient evidence to establish that the Department stops motorboats or vessels operating in the river channel with docking lights illuminated as a pretext to investigate the sobriety of the operator.

3. The greater weight of the evidence shows that Lundstrom had probable cause to believe that Higgins had been operating the pontoon in violation of N.D.C.C. § 20.1-13-07.

4. The greater weight of the evidence shows that Higgins was placed under arrest.

5. The greater weight of the evidence shows that Higgins refused to submit to testing under N.D.C.C. § 20.1-13.1-01.

6. The greater weight of the evidence shows that Jackie Lundstrom had probable cause to believe that Randy Brian Higgins had been operating a pontoon, a motorboat or vessel, in violation of N.D.C.C. § 20.1-13-07 on July 12, 2003, that he was lawfully arrested, that he refused to submit to a chemical test under N.D.C.C. § 20.1-13.1-01, and that he has not previously been prohibited from operating a motorboat or vessel for a violation of N.D.C.C. ch. 20.1-13.1 or for a violation of N.D.C.C. § 20.1-13-07.

## DECISION

The greater weight of the evidence showing that Jackie Lundstrom had probable cause to believe that Randy Brian Higgins had been operating a pontoon, a motorboat or vessel, in violation of N.D.C.C. § 20.1-13-07 on July 12, 2003, that he was lawfully arrested, that he refused to submit to a chemical test under N.D.C.C. § 20.1-13.1-01, and that he has not previously been prohibited from operating a motorboat or vessel for a violation of N.D.C.C. ch. 20.1-13.1 or for a violation of N.D.C.C. § 20.1-13-07, he shall be, and hereby is, prohibited from operating a motorboat or vessel for a period of one year.

Dated at Bismarck, North Dakota, this 6<sup>th</sup> day of August, 2003.

State of North Dakota  
Game and Fish Department

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